IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

:: J U D G M E N T ::

D.B. CRIMINAL APPEAL NO.1035/2002
(Om Prakash & Ors. Vs. The State of Rajasthan)

D.B. CRIMINAL APPEAL UNDER SECTION 374 (2) Cr.P.C. AGAINST THE JUDGMENT DATED 27.11.2002 PASSED BY THE LEARNED ADDIIONAL SESSIONS JUDGE (FAST TRACK), CHURU IN SESSIONS CASE NO. 21/2002 – STATE VS. OM PRAKASH & ORS.

DATE OF JUDGMENT : 09th May, 2006

P R E S E N T

HON'BLE MR. JUSTICE N.N.MATHUR
HON'BLE MR. JUSTICE MANAK MOHTA

Mr. R.S. Gill, for the appellants.
Mr. Vishnu Kachhawah, Public Prosecutor.

BY THE COURT : (PER HON'BLE MR. MATHUR,J.)

. The appellants Om Prakash along with three sons of Ram Swaroop namely Sant Lal, Prem and Balwan were put to trial on the charge of murder of Jai Lal. The learned Additional Sessions Judge (Fast Track), Churu by the impugned judgment dated 27.11.2002 having found the prosecution case proved, convicted

the appellants Om Prakash and Sant Lal for offence under Section 302 IPC and sentenced each of them to imprisonment for life and to pay a fine of Rs.500/- in default of payment of fine to further undergo simple imprisonment for three months. Appellants Prem and Balwan have been convicted for offence under Section 302 IPC with the aid of Section 34 IPC and sentenced in the same manner. All the appellants have also been convicted for offence under Section 450 IPC and sentenced to five years rigorous imprisonment and to pay a fine of Rs.200/- in default of payment of fine to further undergo simple imprisonment for one month. Appellants Om Prakash and Sant Lal have also been convicted for offence under Section 3 and Section 25 of the Arms Act and sentenced to one year rigorous imprisonment and three years rigorous imprisonment respectively.

2. The factual scenario as emerged during the trial is that the deceased Jai Lal along with his brother PW-2 Banne Singh, PW-3 Bharta Ram and PW-9 Hari Karan lived in village Dayavath. He carried a grossery shop and flour mill in the nearby village Sidhmukh.

3. The complainant party in the instant case is also accused in a murder case. On the date of incident while PW-12 Subhash son

of the deceased was in jail, the other persons namely PW 2 Banne Singh, PW-3 Bharta Ram and PW-9 Hari Karan were on bail. Thus, there existed hostility between the appellant Om Prakash and deceased. On 28.10.1999 PW-2 Banne Singh, PW-3 Bharta Ram, PW-9 Hari Karan etc. had gone to Rajgarh for attending the date of hearing in the case of State vs. Subhash. In the evening, they returned to village Sidhmukh.

4. As per the version given in FIR, lodged by PW-2 Banne Singh on 29.10.1999 at 10:15 AM at Police Station Sidhmukh, the complainant party returned from Rajgarh after attending the date of hearing and deceased Jai Lal went to his grossery shop and the other persons namely PW-2 Banne Singh, PW-3 Bharta Ram and PW-9 Hari Karan spent night in the flour mill. In the morning, the informant PW-2 Banne Singh boarded the Bus and straightway went to the office of PW-1 Mahendra Singh at Rajgarh, where he was advised to immediately return to Sidhmukh. He was told that as per the telephonic information of PW-4 Birma Ram, his brother Jai Lal has been shot dead at about 08:15 AM. Thus, he immediately returned to Sidhmukh and proceeded to flour mill, where PW-3 Bharta Ram, PW-9 Hari Karan, PW-6 Narendra Kumar and PW-5 Sher Singh narrated the incident that on noticing suspicious movement of appellants Om Prakash, Balwan, Sant Lal and Prem in front of the flour mill,

they chased them. All the four accused-appellants entered into the shop of Jai Lal. The appellants Om Prakash and Sant Lal were carrying pistols in their hands. All the four accused persons were exhorting to kill enemy. The appellants Om Prakash and Sant Lal fired two gun shots hitting in the chest of Jai Lal. All the four accused persons fled away. They entered in the shop and found Jai Lal dead. On this information Police registered a case for offence under Section 302, 450, 34 IPC and Section 25 of the Arms Act and proceeded with investigation. During the investigation, police prepared the site plan and sent the dead body for autopsy. PW-20 Dr. Jai Lakhatiya conducted the autopsy vide Exh.P/49 and noticed the following injuries :-

1. Fire Arm Wound:

(i) Wound of entrance: ½'' x ½'' x chest cavity deep with bruising & tattooing ½'' around the wound at left nipple margins lacerated under wound and round 2½'' away and left of mid line of sternum. On dissection there is clotted blood under shin and there is fracture of left IV & V ribs below the wound. There is laceration of heart and lung left and there is wound of exit just below the left scapula.

(ii) Wound of exit: 1/3 x 1/3 x thorax cavity deep. Lacerated margin & everted with oozing of blood present - Bruising of across the wound present.

(iii) Wound of entrance II present at lower end of sternum just to right side of xyphoid process. ½ x 1/3'' slight oval in shape with under wound margins and ½'' bruising & tattooing around it. There is fracture of medial of lower ribs 7 & 8th on right side. On dissection there is laceration of liver bruising of stomach and laceration of spleen and there is wound of exit 3'' below the angle of left scapula.

(iv) Wound of exit: 1/3x1/3 x abdominal cavity deep with oozing of blood at 3'' below the angle of left scapula ¼''

bruising around the exit wound present.

In his opinion the cause of death was shock and hemorrhage.

5. The police recovered the pistol, an empty cartridge and a live cartridge from the possession of appellants Om Prakash and Sant Lal in pursuance of the information given by them. After obtaining the experts report and completing the other formalities, police laid charge-sheet against the appellants for offence under Sections 302, 450, 34 IPC and Section3/25(1)(b) and Section 27 of the Arms Act.

6. The appellants denied the charges levelled against them and claimed trial. The prosecution produced oral and documentary evidence. The appellants in their statement under Section 313 Cr.P.C. denied the correctness of the evidence appearing against them and pleaded innocence. Appellants Balwan and Prem also pleaded alibi. In support of the plea they examined DW-1 Dayanand, DW-2 Sultan Singh. The trial court having found the charges proved convicted the appellants in the manner indicated above.

7. We have heard learned counsel for the parties and perused

the record. The case of the prosecution is based on the evidence of occurrence of PW-3 Bharta Ram, PW-6 Narendra Kumar, PW-9 Hari Karan and PW-10 Rajpal.

8. PW-3 Bharta Ram deposed that he was one of the accused along with Subhash, Mangi Ram, Banne Singh and Narendra pending in the court at Rajgarh. On the date of incident, while Subhash was in jail, he along with others were on bail. Because of the said case, the relations between the complainant party and the accused appellants were hostile. On 28.10.1999 he along with Banne Singh, Surendra, Narendra etc. had gone to Rajgarh for attending the date of hearing. They returned to the village Sidhmukh in the evening at about 5:00 PM. They went to the flour mill of PW-2 Banne Singh and stayed during the night. PW-5 Sher Singh and PW-10 Rajpal also stayed with them at the flour mill. After taking food all of them went to sleep in the flour mill. In the morning, PW-2 Banne Singh left for Rajgarh. They all were preparing to move out from Sidhmukh. However, they found the appellants Om Prakash, Prem, Sant Lal and Balwan moving in front of the flour mill. The appellants moved in south about 50 feet and proceeded towards the shop of Jai Lal. Suspecting some foul on account of hostility with the appellants, he along with Narendra, Mange Ram, Rajpal, Sher Singh and Hari Karan followed them. All the four accused persons entered

in the shop of Jai Lal. Appellants Om Prakash and Sant Lal were carrying pistols in their hand. The appellants surrounded Jai Lal. Appellants Prem and Balwan were unarmed. The deceased Jai Lal was pleading mercy on him. Appellant Prem exhorted the accused persons to shoot Jai Lal. The appellant Om Prakash open fired at Jai Lal. On exhortion by Prem, Sant Lal also fired at Jai Lal. The gun shot hit Jai Lal at his chest. The incident was witnessed by him and the other witnesses from a distance of about 5 to 7 yards from the shop. The appellants after shooting Jai Lal, moved towards market. He along with other witnesses entered into the shop of Jai Lal and found him dead. PW-2 Banne Singh returned from Rajgarh at about 9:45 AM. The incident was narrated to Banne Singh. They all stayed back in the shop of Jai Lal and Banne Singh went to Police Station to lodge the First Information Report. In the cross-examination, the witness admitted that Om Prakash fired the pistol at Jai Lal from a short distance of 1 feet. They also stated that Sant Lal fired at Jai Lal after he had fallen on the ground. The police recovered one live cartridge and two empty cartridges from the spot. One empty cartridge was fixed in the earth. One empty cartridge was fixed on the back of the deceased Jai Lal. He denied the suggestion that the appellant Balwan had gone to Delhi from Malsisar on the date of incident. He also denied the suggestion that the appellant Prem had gone to village Kirada on the date of incident. They

also denied the suggestion that appellants were falsely implicated because of hostility with them on account of the murder of their brother.

9. PW-6 Narendra Kumar reported that on 28.10.1999, he along with others namely PW-3 Bharta Ram, PW-9 Hari Karan, PW-10 Rajpal, PW-2 Banne Singh and Mange Ram returned from Rajgarh after attending the date of hearing of the case, in which he was also one of the accused. Jai Lal had also returned with them. He went to his grossery shop and he along with others went to the flour mill of PW-2 Banne Singh. All of them stayed in the four mill. At about 8:00 AM they were surprised to see the appellants Om Prakash, Balwan, Prem and Sant Lal moving on the road. Suspecting foul, they followed them. The appellants moved towards the shop of deceased Jai Lal. They entered in the shop of Jai Lal. The deceased Jai Lal was pleading mercy before them. Prem and Balwan exhorted to kill Jai Lal. The appellant Om Prakash open fired hitting Jai Lal at his chest. On account of which, he fell down. After he had fallen, the appellant Sant Lal fired on Jai Lal. He along with other witnessed the incident from a distance of 5 to 6 feet. They raised the hue and cry. The appellants fled away towards the southern side in the market. He along with other entered in the shop and found Jai Lal dead. On arrival of Banne Singh, the incident was narrated to him. He

went to police station to lodge First Information Report. In the cross-examination he admitted that he was also one of the accused facing trial on the charge of murder of Dharampal, the brother of appellant Om Prakash. He also admitted that he has been convicted in the said case. He also admitted that the appellants in the instant case are witnesses against him and other accused persons in the trial on the charge of murder of Dharmpal. He denied the suggestion of not witnessing the incident. The statement of PW-9 Hari Karan is almost on the same line as of two other eye witnesses namely PW-3 Bharta Ram and PW-6 Narendra Kumar.

10. The statement of PW-10 Rajpal is on the same line as of the other three eye witnesses referred to above. In the cross-examination, he has admitted that in his earlier statement Exhibit-D/8 he had omitted to state about the exhortation by Prem and Balwan. He also admitted that he is not an accused in the case of murder of Dharampal.

11. PW-5 Sher Singh after giving the narration like others of returning to Sidhmukh after attending the court at Rajgarh refused to have witnessed the incident. He however, stated that after hearing the cries, he rushed to the shop of Jai Lal. He found that the dead body of Jai Lal lying in the shop. He also found that

Hari Karan, Bharata Ram, Narendra, Mange Ram and Rajpal were standing outside the shop. The said witnesses disclosed to him that Jai Lal was shot dead by the appellants Om Prakash, Sant Lal, Balwan and Prem. This witness was declared hostile by the prosecution. Irrespective of the fact that the witness has been declared hostile, his statement is relevant to the extent that the other four eye witnesses namely PW-3 Bharta Ram, PW-6 Narendra Kumar, PW-9 Hari Karan and PW-10 Rajpal were present at the place where the dead body of Jai Lal was lying. The said witnesses disclosed to him that Jai Lal was shot dead by the appellants.

12. PW-1 Mahendra Singh is a lawyer by profession practicing at Rajgarh. He stated on oath that on 29.10.1999 at about 8:45 AM, he received a telephonic message from Sidhmukh that Jai Lal has been shot dead at his shop by Om Prakash and others. He was asked to inform PW-2 Banne Singh, the brother of Jai Lal. After some time when Banne Singh arrived, he gave the information of the murder of Jai Lal and advised him to immediately return to Sidhmukh.

13. PW-2 Banne Singh is the brother of the deceased Jai Lal. He runs flour mill in village Sidhmukh. He deposed that his deceased brother Jai Lal was running a grossery shop in village

Sidhmukh. He has given the narration like other witnesses to the extent that they had returned from Rajgarh after attending the court date on 28.10.1999. The witnesses Bharta Ram, Narendra, Mange Ram, Rajpal and Hari Karan stayed at his flour mill during the night. He went to the bus stand for boarding the bus for going to Rajgarh. He found appellants Om Prakash, Sant Lal and Balwan on the bus stand. He reached Rajgarh and went to the house of PW-1 Mahendra Singh, where he got the information of the death of Jai Lal. When he returned to Sidhmukh, Hari Karan, Bharata Ram, Mange Ram, Rajpal, Narendra, Sher Singh etc. gave him information about the murder of Jai Lal. They gave him the entire narration of the incident. He went to the Police Station and lodged the FIR on the basis of the information received by him. He has given the details of the investigation.

14. PW-4 Birma Ram is a resident of Sidhmukh, the person who gave telephonic information of the incident to PW-1 Mahendra Singh. PW-7 Devi Lal and PW-8 Jagdish are the photographers.

15. PW-19 Jile Singh was posted as A.S.I. Police Station, Sidhmukh at the relevant time. The initial investigation was taken up by him. He has given the details of the inspection of the site and he recovered an empty cartridge from the spot and

seized the same vide Exh.P/5. It was packed and sealed in packet-A. Live cartridge recovered from the spot was sealed and seized vide Exh.P/6 in packet-B. Pieces of fire bullets were seized vide Exh.P/7 and packed in packet-C.

16. PW-21 Rajeev Rahad is the in-charge of the Police Station, Sidhmukh and took over the investigation on 02.11.1999. He arrested appellant Om Prakash vide Exh.P/56. In pursuance of the information given by him a country made pistol and an empty cartridge was recovered from his house vide Exh.P/14. The recovery was made in presence of motbirs PW-6 Narendra Kumar and PW-11 Subhash. Both the articles were packed and sealed in packet-E. The appellant Sant Lal was arrested vide Exh.P/58. In pursuance of the information given by him vide Exh.P/63 a country made pistol was recovered from his house. Vide Exh.P/16 in presence of motbirs Narendra Kumar and Subhash the recovered article namely country made pistol was seized and sealed in a packet and marked as F. All the articles were deposited by PW-21 Rajeev Rahad with Malkhana in-charge. The prosecution has produced the witnesses of link evidence i.e. PW-13 Kailash Chandra, PW-14 Aajam Ali, PW-15 Devkaran, PW-16 Jai Karan and PW-17 Bhoma Ram. It is stated that the deposited articles were sent to the Forensic Science Laboratory in the sealed condition. It is not necessary to deal

with the link evidence as the same has not been challenged by learned counsel for the appellants.

17. As per the FSL report Exp.P/66 both the country made pistols recovered from the house of Om Prakash and Sant Lal marked as W1 and W2 were found to be serviceable. It was also found that both the pistols had been fired. It was opined that two empty cartridges recovered from the spot vide Exh.P/5 and Exh.P/14 from the possession of the appellant Om Prakash were fired from pistol (W1). Thus, it is amply proved that the two gun shots were fired from the pistol of Om Prakash. At this stage, it is contended by the learned counsel that as both the shots have been fired from the pistol of Om Prakash, the case of the prosecution firing gun shot by Sant Lal stands falsified. We are unable to agree with the submissions of the learned counsel. The case of the prosecution as stated by eye witnesses is that after Jai Lal had fallen on the ground on receiving gun shot fired by Om Prakash, Sant Lal open fired. Site plan Exh.P/9 shows that one empty cartridge was fixed in the earth. It appears that the fire made by Sant Lal did not hit Jai Lal. Thus, even if, the fire did not hit Jai Lal the fact remains that gun shot was fired by Sant Lal.

18. Having critically scrutinized the evidence of PW-3 Bharta

Ram, PW-6 Narendra Kumar, PW-9 Hari Karan and PW-10 Rajpal, we find that they are credit-worthy witnesses. The only criticism made against them is that they are highly interested and partitioned witnesses. It is of course true that the backdrop of the case unflurs the story of hostility, which existed between the parties, but this alone cannot be a ground to discredit the testimony of the witnesses of occurrence. It only pushes the court on guard to scan the testimony of the witnesses with great circumspection. It is well settled that the evidence of witnesses of occurrence cannot be thrown above board merely because they are interested and partitioned witnesses.

19. On careful scrutiny of the witnesses of occurrence and other evidence, we are of the view that there is neither any inconsistency nor such improbability which may discredit the testimony of the witnesses of occurrence. The FIR has been filed promptly, which reflects almost contemporaneous account of what had taken place on spot. The presence of the witnesses is natural. As they had returned from Rajgarh after attending the date of hearing in the court and stayed in the flour mill of PW-2 Banne Singh during the night. The flour mill is only at the distance of 150 yards from the place of incident. Immediately telephonic information of the incident was given to PW-1 Mahendra Singh, Advocate at Rajgarh. It was clearly stated that

Jai Lal was shot dead by Om Prakash and others. The narration of the incident finds corroboration from the medical evidence as well as the recovery of the pistols at the instance of the accused Om Prakash and Sant Lal. As per the FSL report, both the pistols have been found serviceable. Two shots have been fired from the pistol recovered from the possession of Om Prakash. As regards Sant Lal, he had fired the pistol after Jai Lal had fallen on the ground. It may not have hit the deceased Jai Lal, but it clearly discloses that he shared the common intention with Om Prakash in committing the murder of Jai Lal. Thus, while Om Prakash is liable to be convicted for the substantive offence under Section 302 IPC, Sant Lal is also liable to be convicted for offence under Section 302/34 IPC. As regards two other accused persons namely Prem and Balwan the only evidence against them is of exhortation. It is admitted by the prosecution witnesses that both the appellants were unarmed. The only allegation is of exhortation. It is well settled that the evidence of exhortation is a weak type of evidence. On the facts of the case it is difficult to hold that Prem and Balwan shared the common intention with Om Prakash and Sant Lal in committing the murder of Jai Lal. Thus, we are of the view that their conviction for offence under Section 302/34 IPC is not sustainable.

20. Consequently, the appeal is partly allowed. The conviction

of the appellant Om Prakash is sustained for offence under Section 302 IPC. The conviction of Sant Lal is altered to Section 302/34 IPC from Section 302 IPC. The sentence of both the appellants Om Prakash and Sant Lal for offence under Sections 302, 302/34 and also 450 IPC and Section 3/25 and 27 of the Arms Act is maintained. Both of them are in jail. They will serve out the remaining part of the sentence. The appellants Prem and Balwan are acquitted of the charges levelled against them of offence under Sections 302, 302/34 and 450 IPC. They are on bail. Their bail bonds stand discharged.

(MANAK MOHTA),J. **(N.N.MATHUR),J.**

Ashwini/-